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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

SAMI FAYEZ S. ABURAHMAH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER TRIAL COUNSEL'S FAILURE TO MAKE A MOTION TO DISMISS THE CHARGE AGAINST MR. ABURAHMAH, BASED ON THE FACT THAT THE INDICTMENT WAS NOT RETURNED UNTIL MORE THAN FIVE YEARS AFTER THE STATUTE OF LIMITATIONS PERIOD OF 18 U.S.C. § 3282 HAD RUN CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL?

II. WHETHER THE DISTRICT COURT ERRED IN FAILING TO GRANT MR. ABURAHMAH AN EVIDENTIARY HEARING ON HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, PURSUANT TO 28 U.S.C. §2255?

PARTIES TO THE PROCEEDING

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OPINIONS IN THE COURTS BELOW

The opinion of the Court of Appeals affirming the ruling of the district court is *United States v. Sami Fayez S. Aburahmah*, No. 95-16374, an unpublished memorandum

decision. The district court decision is *United States v. Sami Fayez S. Aburahmah*, 92-7050 TUC, published as *United States v. Aburahmah*, 827 F.Supp. 612 (D. Ariz. 1993), *aff'd*, 34 F. 3d 1074 (9th Cir 1994).

STATEMENT OF JURISDICTION

On January 28, 1997, the Ninth Circuit Court of Appeals entered judgment affirming the district court's decision in this case. This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pursuant to Rule 14(f) of the Supreme Court Rules, the relevant constitutional provisions, statutes and regulations involved are cited here and the pertinent text is set out in the appendix.

Sixth Amendment to the United States Constitution

18 U.S.C. §1201(a)

18 U.S.C. §3282

18 U.S.C. §3290

28 U.S.C. §2255

STATEMENT OF THE CASE

Petitioner respectfully requests that a writ of certiorari be issued to review the judgment of the Ninth Circuit Court of Appeals, in *United States v. Sami Fayez S. Aburahmah*, No. 95-16374, which affirmed the district court's denial of Mr. Aburahmah's 28 U.S.C. §2255 petition for a writ of habeas corpus alleging ineffective assistance of counsel. The Ninth Circuit Court of Appeals had jurisdiction to review this case pursuant to Title 18 U.S.C. §1294(1).

On October 4, 1982, Emerald Crawford's body was discovered, but the body could not be identified.

Trial testimony indicates that Mr. Aburahmah was in Tucson, Arizona in October of 1982 and he remained in that jurisdiction until April or May of 1983.

On May 18, 1983 Mr. Aburahmah was arrested, under his true name, Sami Fayez Aburahmah, in Alabama, for charges unrelated to this case. He was subsequently convicted of these charges and remained in custody, under his true name, from May 18, 1983, until his indictment and arrest on the instant case.(Appendix; 64, 65)

On October 11, 1989, Detective Nunez phoned the Birmingham Prison where Mr. Aburahmah was incarcerated and asked to speak to him. A few hours later Mr. Aburahmah called Detective Nunez back, collect, and they had a conversation about the disappearance of Mr. Aburahmah''s wife, Emerald Crawford.(Appendix; 68)

On November 22, 1991, the body found on October 4, 1982 was identified as Emerald Crawford.

On November 30, 1991, Detective Nunez and FBI Special Agent Price interviewed Mr. Aburahmah at the Birmingham Prison regarding the disappearance of his wife.(Appendix; 71)

On October 2, 1992, the Grand Jury for the United

States District Court for the District of Arizona, Tucson Division, handed down a one count indictment against Petitioner Sami Fayez S. Aburahmah charging him with a violation of 18 U.S.C. § 1201 (kidnapping). The indictment charged that the kidnapping occurred "on or about October 1, 1982".

On May 6, 1993, a jury found Petitioner Sami Fayez S. Aburahmah guilty of a violation of 18 U.S.C. § 1201 (kidnapping) On August 4, 1993, the court sentenced Mr. Aburahmah to life imprisonment, consecutive to the twenty-five year sentence which he is currently serving in the State of Alabama, as well as a restitution fine in the amount of $7,000.00 . Mr. Aburahmah has not yet served any part of his life sentence, as it is consecutive with the state sentence he is currently serving.

Mr. Aburahmah appealed his conviction on August 5, 1993 and the Ninth Circuit Court of Appeals denied his appeal on August 25, 1994 on the grounds that direct appeal is not a proper forum to raise the issue of ineffective

assistance of counsel.

On March 20, 1995 Mr. Aburahmah filed a petition for a writ of habeas corpus with the District Court for the District of Arizona, alleging ineffective assistance of counsel. The district court denied that petition on July 10, 1995. *United States v. Aburahmah*, 827 F.Supp. 612 (D. Ariz. 1993), *aff'd*, 34 F. 3d 1074 (9th Cir 1994).

As a result of this decision, the petitioner filed an appeal with the Ninth Circuit Court of Appeals. On January 28, 1996, that court filed an opinion affirming the district court's denial of Mr. Aburahmah's petition for a writ of habeas corpus.

REASONS FOR ALLOWANCE OF THE WRIT

The Ninth Circuit Court of Appeals denied Mr. Aburahmah's habeas petition because it ruled that he had not "established the elements of (his counsel's) deficient performance or resulting prejudice". The Court gave deference to counsel's strategic decisions to "avoid the hindsight of an unsuccessful defense" and the Court found

that Petitioner's argument regarding his counsel's failure to assert the statute of limitations defense, went to the strategy of trial counsel. The Court found that Mr. Aburahmah had not demonstrated prejudice, as a motion to dismiss the indictment on the statute of limitations would not have been successful. At the same time the Court upheld the district court's decision that Mr. Aburahmah was not entitled to an evidentiary hearing on his petition.

The district court decision denying the §2255 petition was in error in two ways: 1) The attribution of a "strategic" purpose to explain trial counsel's failure to file a motion to dismiss for a violation of the statute of limitations is patently ridiculous 2) the finding without an evidentiary hearing that such a motion would have been fruitless because Mr. Aburahmah was a fugitive was not only without evidentiary support; it was in clear contradiction to all of the evidence before the trial court. Therefore, Mr. Aburahmah respectfully requests that this Court grant his petition for writ of certiorari.

I. CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER TRIAL COUNSEL'S FAILURE TO MAKE A MOTION TO DISMISS THE CHARGE AGAINST MR. ABURAHMAH BASED ON THE FACT THAT THE INDICTMENT WAS NOT RETURNED UNTIL MORE THAN FIVE YEARS AFTER THE STATUTE OF LIMITATIONS PERIOD OF 18 U.S.C. § 3282 HAD RUN CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL

It is clear that Mr. Aburahmah's counsel's failure to make a motion to dismiss, based on the statute of limitations defense cannot be justified as sound trial strategy. Counsel's performance was unquestionably deficient and Mr. Aburahmah was prejudiced by his counsel's failure to make a motion to dismiss the indictment based on the fact that the statute of limitations had run on the crime for which he had been charged.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set forth the standard for determining whether effective assistance of counsel has been rendered in a criminal case. The Court held that the proper standard for attorney performance is that of "reasonably effective

assistance." Under *Strickland*, in order to obtain relief for ineffective assistance of counsel the defendant must demonstrate first that counsel's performance was deficient, requiring a showing that counsel made errors of a serious nature. Second, the defendant must show that the deficient performance harmed the defense by establishing that counsel's errors resulted in prejudice, but for which the result of the case would likely have been different. See also, *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978) (*en banc*); *United States v. Tucker*, 716 F.2d 576 (9th Cir. 1983).

A. COUNSEL'S DEFICIENT PERFORMANCE

In this case, it is clear that Mr. Aburahmah was denied his Sixth Amendment right to constitutionally sufficient counsel because his lawyer failed to render reasonably effective assistance. A reasonably effective lawyer would have made a pre-trial motion to dismiss the charge because the evidence clearly showed that the government had violated the applicable five year statute of limitations by bringing the indictment. This error was of a serious nature,

as counsel's deficient performance deprived Mr. Aburahmah of a complete dismissal of the charge against him.

The proper measure of an attorney's performance is its "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. Prevailing norms of practice such as those reflected in the ABA Standards may inform the Court's determination of what is reasonable. *Id.* Specifically, counsel must inform himself or herself fully "on the facts and the law, "thoroughly advise the client concerning all aspects of the case, and keep the client informed of developments in the case. ABA Standards 4-3.8, 4-5.1(a); see also, *Strickland*, 466 U.S. at 688. The failure to research the basic law relevant to the case constitutes ineffective assistance of counsel. *Cooks v. United States*, 461 F.2d 530 (5th Cir. 1972); *Alford v. Wainwright*, 725 F.2d 1282 (11th Cir. 1984); *Kennedy v. Maggio*, 725 F.2d 269 (5th Cir. 1984); *United States v. Loughery*, 908 F.2d 1014 (D.C. Cir. 1990); *Stevens v. Johnson*, 575 F.Supp. 881 (E.D.N.C. 1983).

In the instant case, the failure of court-appointed

counsel to know the law, or to research the law, rendered the adversarial process a sham. The government obtained an indictment five years out of date, which should never have been filed in the first place, and secured a conviction of the defendant when the case should have been dismissed before trial.

In the case at bar, the Ninth Circuit Court of Appeals found that Mr. Aburahmah's trial counsel's failure to assert the statute of limitations defense was a trial "strategy". (Appendix; 5) However, this ruling is contrary to both the case law regarding the standards of reasonableness for judging counsel's decisions and common sense. Mr. Aburahmah's trial counsel did not make a decision based on sound trial strategy to forego the statute of limitations defense by failing to make a motion to dismiss. Such a decision would have been illogical and the analysis leading to it would have been completely unreasonable. This is because there was no potential prejudice or harm which could have befallen the petitioner if trial counsel had

made a motion to dismiss the indictment based on the expiration of the statute of limitations and the potential benefit to the Petitioner of making this motion was enormous; Mr. Aburahmah would have had the charge dismissed. If counsel made such a decision, it was clearly unreasonable trial strategy, proving that counsel's performance fell below an objective standard of reasonableness. However, the failure to raise the statute of limitations defense in this case was not a trial strategy because it was not based on a reasonable tactical decision by counsel . In fact, the only logical explanation for counsel's failure to pursue this is that counsel was unaware of the existence of the defense. Clearly, this is unacceptable performance. It was not counsel's decision to forego this defense, rather counsel's failure to make this motion was based on her ignorance of the law regarding the federal statute of limitations for kidnapping.

In *Kimmelman v. Morrison*, 477 U.S. 365, (1986), this Court found that the appellant's trial counsel's performance

was constitutionally deficient because counsel's failure to make a timely motion to suppress evidence, which was damaging to his client, was not due to tactical considerations of trial strategy. Instead, it was due to counsel's ignorance of both the questionable search, which resulted in the seizure of this evidence and the state's intention to introduce this evidence. *Kimmelman* at 384-385. Defense counsel was ignorant of this evidence and the search because he had failed to conduct any pre-trial discovery. *Id.* This Court found that counsel's performance could not be justified as sound trial strategy because it was based on ignorance. *Id.* at 385. This Court stated: "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id. quoting, Strickland v. Washington*, 466 U.S. 668, 691 (1984). This Court further emphasized the seriousness of an attorney's failure to investigate: " Respondent's lawyer neither investigated, nor made a reasonable decision not to investigate, the State's case through discovery. Such a complete lack of pretrial

preparation puts at risk both the defendant's right to an ample opportunity to meet the case of the prosecution and the reliability of the adversarial testing process." *Kimmelman* at 385, citing Strickland at 685 *quoting, Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942).

Similarly, in the case at bar, Mr. Aburahmah's counsel's failure to raise the statute of limitations defense cannot seriously be considered a trial strategy. As in *Kimmelman*, counsel's failure to make a motion to dismiss based on the statute of limitations was the result of her failure to properly investigate the case. Clearly, she was unaware that the statute of limitations for the charge against Mr. Aburahmah had run out and her failure to assert this defense was based on this ignorance.(Appendix;.18) In short, counsel's failure to investigate the law rendered her performance deficient because it was not based on sound trial strategy. In fact, it was not based on trial strategy at all. It was the result of ignorance and a failure to investigate, which is completely unacceptable performance.

The failure of counsel to assert a statute of limitations defense has been found to constitute ineffective assistance of counsel. *United States v. Hansel*, 70 F.3d 6, 7, 8 (2d Cir. 1995). In *Hansel*, the Court found the following: "counsel's failure to object to the time-barred counts is unaccountable in the circumstances, and cannot be considered sound trial strategy." *Id.* at 8.

In the instant case, Mr. Aburahmah's counsel's failure to raise the same statute of limitations defense as counsel failed to raise in *Hansel*, cannot be considered sound trial strategy. As in *Hansel*, the failure to raise this defense provided no potential benefit to Mr. Aburahmah and significant potential detriment. Therefore, Mr. Aburahmah's counsel's performance was deficient.

B. PREJUDICE

Once Mr. Aburahmah has proven that his trial counsel did, in fact, render him ineffective assistance, he must then show that the deficient performance harmed him by establishing that but for the attorney's errors, the

outcome of the case would likely have been different. *Strickland* at 669. In this case, the outcome clearly would have been different, had counsel performed up to the standards of effective assistance. Had Mr. Aburahmah's attorney performed basic legal research and found the applicable standard of limitations, she would have seen that the time limit to file the instant charge against Mr. Aburahmah had expired five years before the indictment came down. A court would certainly have applied the law and dismissed the indictment outright on Mr. Aburahmah's motion, because it is clear that the statute of limitations operates as an iron clad rule. Dismissal for violation of the statute is required without regard to any showing of prejudice by a defendant. Therefore, Mr. Aburahmah's conviction is a direct result of counsel's carelessness and error.

Title 18, U.S.C. § 1201 provides in relevant part as follows:

(a) Whoever unlawfully seizes,

> confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:
>
> (1) the person is willfully transported in interstate of foreign commerce . . . shall be punished by imprisonment by any term of years or for life.

The statute of limitations on offenses committed under 18 U.S.C. § 1201 is set out in 18 U.S.C. § 3282:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next, after such offense shall have been committed.

This Court discussed this five year statute of limitations extensively in the case of *Toussie v. United States*, 397 U.S. 112 (1970). This Court noted in relevant part that:

> In deciding when the statute of limitations begins to run in a given case several considerations guide our decision. The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals

> from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. For these reasons and others we have stated before "the principle that criminal limitations statutes are 'to be liberally interpreted in favor of repose,' *United States v. Scharton*, 285 U.S. 518, 522 (1932)." *United States v. Habig*, 390 U.S. 222, 227 (1968). We have also said that "[s]tatutes of limitations normally begin to run when the crime is complete." *Pendergast v. United States*, 317 U.S. 412, 418 (1943); see also, *United States v. Irvine*, 98 U.S. 450 (1879). And Congress has declared a policy that the statute of limitations should not be extended "[e]xcept as otherwise expressly provided by law." 18 U.S.C. § 3282; *Toussie*, 397 U.S. at 115 (emphasis added).

In *United States v. Garcia*, 854 F.2d 340 (9th Cir. 1988), the Ninth Circuit Court of Appeals explicitly dealt with the issue of when the statute of limitations begins to run for the charge of kidnapping under 18 U.S.C. § 1201. The Court held that the involuntariness of the seizure and detention is the essence of the crime of kidnapping, and that

the statute of limitations begins to run as soon as "the victim ceases to be held." *Garcia*, 854 F.2d at 344. Thus, when the detention of the victim ceases, the statute of limitations begins to run. The *Garcia* Court also explicitly noted that the five-year general statute of limitations applies to the federal offense of kidnapping.

In this case, the victim ceased to be held as of October 4, 1982, when her body was found in New Mexico. Thus, any physical detention or non-consensual holding was concluded as of that date, and the statute of limitations began to run. However, the indictment in this case was not returned until October 21, 1992, more than ten years after the last date on which the crime could have been committed, and more than five years after the statute of limitations had run.

Despite the five year statute of limitations period set out in 18 U.S.C. § 3282, the undisputed evidence that the offense had been completed no later than October 4, 1982, and the Ninth Circuit's holding in *United States v. Garcia*,

which was decided nearly five years before the trial in this case, appointed counsel for Mr. Aburahmah made no motion to dismiss for violation of the statute of limitations.

The Ninth Circuit Court of Appeals and the district court incorrectly ruled that the statute of limitations had not run in this case, because Mr. Aburahmah "fled the jurisdiction." (Appendix; 6) The Appellate Court simply asserted in its opinion that the record supported its conclusion that Mr. Aburahmah had fled. The Court did not discuss any facts from the record which support this conclusion. The District Court in its opinion found that Mr. Aburahmah had "contemporaneous with Emerald Crawford's disappearance,... abruptly departed Arizona and traveled cross-country to Alabama. However, the evidence in this case demonstrates that he did not flee the jurisdiction in order to avoid prosecution. Mr. Aburahmah filed a declaration with the District Court, which shows that he was not a fugitive from justice and that he was accessible to the police.

This declaration, which Mr. Aburahmah signed under penalty of perjury, states that 1) he did not "flee the jurisdiction," but was taking a planned vacation, and 2) law enforcement knew where to locate him, because the Arizona police telephoned him at the prison in Alabama to ask about his wife's disappearance.

In addition to this affidavit, there was testimony at trial from several witnesses who had contact with Mr. Aburahmah after Emerald Crawford's body was found in October, 1982. These witnesses' testimony proves that Mr. Aburahmah was in the jurisdiction of Arizona from October of 1982 until April or May of 1983. (Appendix; 73 - 84). He did not "leave his usual place of abode and conceal himself for the purpose of avoiding arrest or prosecution", as the Ninth Circuit Court of Appeals stated in its opinion in this case, citing *United States v. Wazney,* 529 F.2d 1287, 1289 (9th Cir. 1976). Instead, the evidence demonstrates that Mr. Aburahmah was living openly within the jurisdiction of Arizona up until the time that he left on a planned vacation

and was arrested in Alabama.

There is also direct evidence from the police that they knew where to find Mr. Aburahmah. On April 19, 1993, at a motion to suppress Mr. Aburahmah's statements, Detective Eduardo Rueben Nunez of the Tucson Police Department, testified that he had first spoken to Mr. Aburahmah on October 11, 1989. He had called the Birmingham Prison in Alabama and asked to speak with Mr. Aburahmah. (Appendix; 68) A few hours later on the same day, Mr. Aburahmah called the detective back, collect. (Appendix; 68) They spoke about Mr. Aburahmah's wife's disappearance. (Appendix; 69) Detective Nunez and FBI Special Agent Gary Price spoke to Mr. Aburahmah in person at the Birmingham Prison on November 30, 1991. (Appendix ; 71)

The government filed no affidavits, sworn statements, or any other evidence, which contravenes either the statements in Mr. Aburahmah's affidavit nor the testimony of prosecution witness, Detective Nunez because

there is no evidence whatsoever that Mr. Aburahmah left the jurisdiction in order to avoid prosecution. Even though the government did not present any evidence to refute Mr. Aburahmah's assertions that he had not fled, the district court found that he was a fugitive. In short, the government presented no proof of flight and no evidence of intent to avoid prosecution. This lack of proof is important because if the defendant's trial counsel had made a motion to dismiss the indictment based on the statute of limitations the government would have had the burden to prove that the defendant fled the jurisdiction. In order to toll the statute of limitations, the government must show by a preponderance of the evidence that the defendant acted with an intent to avoid prosecution. *United States v. Fowlie*, 24 F.3d 1070, 1072 citing, *United States v. Gonsalves*, 675 F.2d 1050, 1054 (9th Cir. 1982) "`Fleeing from justice' requires some `volitional act' coupled with intent. *United States v. Wazney*, 529 F.2d 1287, 1289 (9th Cir. 1979). It is clear that the government did not meet this burden in Mr. Aburahmah's case, as they

offered no evidence to prove that Mr. Aburahmah fled the jurisdiction with intent to avoid prosecution.

The remedy for the government's failure to bring an action within the statute of limitations is to bar the prosecution. *United States v. Hankin*, 607 F.2d 611 (3d Cir. 1979); See, *Benes v. United States*, 276 F.2d 99 (6th Cir. 1960); *Chaifetz v. United States*, 288 F.2d 133 (D.C. Cir. 1960), reversed in part on other grounds 366 U.S. 209 (1961), *reh. denied*, 366 U.S. 955 (1961) [a statute of limitations in a criminal case, unlike such a statute in civil matters, is not merely a statute of repose, but creates a bar to prosecution.] In practical terms, this means that Mr. Aburahmah could not have been prosecuted for the crime of kidnapping, had his counsel made the statute of limitations motion. The fact that she did not make the motion, and as a result, he received a life sentence is absolutely the prejudice required to show ineffective assistance of counsel.

This Court should grant certiorari because Mr. Aburahmah's ineffective assistance of counsel claim raises a

significant question of law and the Appellate Court's decision denying his petition is completely erroneous as the discussion above demonstrates. It is obvious that the Court of Appeals simply ignored the law in this case, in an effort to uphold Mr. Aburahmah's conviction at any cost. Mr. Aburahmah was not charged with murder based on this incident. The only logical reason why a murder charge was not brought by the State is that there was insufficient evidence to prosecute Mr. Aburahmah for the murder of his wife. However, the Court of Appeals must certainly have considered Mr. Aburahmah to be guilty of murder as well as kidnapping, although he was never even charged with murder. Because of the Ninth Circuit Court of Appeal's unwillingness to release Mr. Aburahmah, due to the serious nature of a crime he was never even charged with, it has completely ignored the law in this case and has rendered an erroneous decision. Therefore, this Court should grant certiorari and ultimately order that Mr. Aburahmah's conviction for kidnapping be vacated, as he was deprived of

his Sixth Amendment right to effective trial counsel, under the clear dictates of the law.

II. CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER THE DISTRICT COURT ERRED IN FAILING TO GRANT MR. ABURAHMAH AN EVIDENTIARY HEARING ON HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, PURSUANT TO 28 U.S.C 2255

In its opinion, the Ninth Circuit found that there was "inadequate evidence to raise a factual issue sufficient to justify an evidentiary hearing" in Mr. Aburahmah's case. (Appendix; 8) . In forming this opinion, the Court relied on a Seventh Circuit case, *Patel v. United States*, 19 F.3d 1231, 1235, for the proposition that, "the district court need not hold an evidentiary hearing in every case where the petitioner makes factual allegations" In following this one statement from one case, the Court ignored the plain language of section 2255 as well as case law in other Circuits. 28 U.S.C. §2255 states in relevant part:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice to be served upon the Unites States

> attorney, **grant a prompt hearing thereon,** determine the issues and make findings of fact and conclusions of law with respect thereto. (emphasis added)

This standard for determining if an evidentiary hearing should be granted has been quoted and applied in many cases throughout the Circuits. *Anderson v. United States*, 948 F.2d 704, 706 (11th Cir. 1991); *Ciak v. United States*, 59 F.3d 296, 307 (2nd Cir. 1995); *Government of the Virgin Islands v. Weatherwax*, 20 F.3d 572, 574 (3rd Cir. 1994). In *Ciak*, the Appellate Court ordered that the petitioner be given an evidentiary hearing because he "alleged facts which if found to be true, would have entitled him to habeas relief." *Ciak* at 307. In *Weatherwax*, the Appellate Court found that the petitioner was entitled to an evidentiary hearing because he had raised factual allegations which were not frivolous and which if proven would entitle him to relief. *Weatherwax* at 574, 579. Additionally, the *Weatherwax* Court was further persuaded to grant the petitioner an evidentiary hearing because the government

had not presented contrary evidence to disprove the petitioner's factual allegations. *Id.* at 578.

In the instant case, whether Mr. Aburahmah fled the jurisdiction with intent to avoid prosecution, is a question of fact, which should have been determined at an evidentiary hearing. As in *Ciak* and *Weatherwax*, Mr. Aburahmah raised non-frivolous factual allegations, in his declaration filed with the District Court, which if proven would have entitled him to habeas relief. However, the district court did not allow an evidentiary hearing in this case, but instead made a factual determination that ignored the declaration filed by Mr. Aburahmah in support of his petition. In the instant case, had the district court held an evidentiary hearing, it is clear that the government would not have met its burden to prove that Mr. Aburahmah was a fugitive from justice and the prejudice to Mr. Aburahmah would have been proven.

At an evidentiary hearing, Mr. Aburahmah would have presented evidence, which would have proven that he

had not fled the jurisdiction. Mr. Aburahmah would have presented evidence that he was in state custody in Alabama under his own name, from 1983 up to and through the time of trial. Furthermore, Mr. Aburahmah voluntarily telephoned the New Mexico police from the Alabama state prison collect, under his own name, in order to answer their questions regarding the disappearance of his wife. Clearly, the police knew his whereabouts, and he made no attempt to conceal them. Mr. Aburahmah was not a fugitive from justice during the intervening years between Emerald Crawford's disappearance and the identification of her body; rather he was easily accessible to New Mexico officials.

As in *Weatherwax*, the government presented no evidence to refute the claims Mr.. Aburahmah made in his declaration. In fact, the testimony offered by Detective Nunez, discussed in this petition, corroborates Mr. Aburahmah's declaration, which demonstrates that he was not a fugitive from justice. Therefore, the statute of limitations was not tolled in this case and Mr. Aburahmah

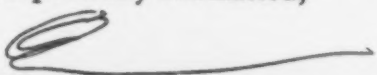
should have been granted an evidentiary hearing because he clearly alleged facts which if true would entitle him to habeas relief for ineffective assistance of counsel. The Ninth Circuit clearly ignored the plain language of the statute in this case as well as the overwhelming case law, which has applied 28 U.S.C §2255. Therefore, the Appellate Court erred in denying Mr. Aburahmah an evidentiary hearing and this Court should grant certiorari to ensure that the correct standard is applied for determining when a petitioner should be granted an evidentiary hearing.

CONCLUSION

For the reasons set forth above, petitioner requests that this Court grant his petition for a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals, and set the case for briefing and oral argument.

Dated: April 26, 1997

Respectfully submitted,



EUGENE G. IREDALE
Attorney for Petitioner
SAMI FAYEZ S. ABURAHMAH

APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JAN 28 1997
CATHY A.CATTERSON,
CLERK
U.S COURT OF APPEALS

UNITED STATES OF AMERICA,	No. 95-16374
Plaintiff-Appellee,	D.C.No. CV95-176-JMR CR-92-705-JMR
v.	MEMORANDUM*
SAMI FAYEZ S. ABURAHMAH,	
Defendant-Appellant.	

Appeal From a Judgment of
The United States District Court
For the District of Arizona
John M. Roll District Judge Presiding
Submitted July 12, 1996***
San Francisco, California

Before: O'SCANNLAIN, LEAVY, Circuit Judges, and

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

HUFF**, District Judge

Appellant Sami Fayez S. Aburahmah appeals the district court's denial of his 28 U.S.C. § 2255 petition for writ of habeas corpus alleging ineffective assistance of counsel. The court has jurisdiction under 28 U.S.C. section 1291. We affirm the district court's denial of appellant's § 2255 petition.

The Sixth Amendments grants a criminal defendant the right to effective assistance of counsel. Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact that this court reviews *de novo*. United States v. Blaylock, 20 F.3d 1458, 1464-65 (9th Cir. 1994). In this case, defense counsel's conduct did not amount to ineffective assistance of counsel under the relevant standard of review.

Strickland v. Washington, 466 U.S. 668 (1984).

Under Strickland, an appellant claiming ineffective

**The Honorable Marilyn L. Huff, United States District Judge for the Southern District of California, sitting by designation.

assistance of counsel must first prove that there has been a deficient performance, and then demonstrate consequent prejudice. Id. at 687-88, 693-94; United States v. Davis, 36 F.3d 1424, 1433 (9th Cir. 1994), cert. denied, _U.S._, 116 S.Ct. 443 (1995).

To establish ineffective assistance of counsel, appellant must demonstrate that his counsel's performance was unreasonably deficient and that, but for counsel's errors, the result of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984). The appellant must meanwhile overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [appellant] must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689 (quoting Michael v. Louisiana, 350 U.S. 91, 101 (1955)). On review, we apply a deferential standard to counsel's strategic decisions so as to avoid the hindsight dissection of an unsuccessful defense.

United States v. Appoloney, 761 F.2d 520, 525 (9th Cir.), cert. denied, 474 U.S. 949 (1985).

Finally, appellant must demonstrate that prejudice resulted from the alleged errors of counsel. Prejudice is found where there is a "reasonable probability" that the outcome would have been altered. Strickland, 466 U.S. at 694. The Supreme Court defines a reasonable probability as "a probability sufficient to undermine confidence in the outcome." Id. See also United States v. Murray, 751 F.2d 1528, 1535 (9th Cir.), cert. denied, 474 U.S. 979 (1985); United States v. Schaflander, 743 F.2d 714, 717-718 (9th Cir. 1984), cert. denied, 470 U.S. 1058 (1985).

Appellant has not established the elements of deficient performance or resulting prejudice. First, appellant challenges his counsel's failure to move for a dismissal of the indictment on the basis of the statute of limitations. Secondly, appellant contests his counsel's failure to submit a "live victim" jury instruction. Neither claim has merit.

Appellant has not demonstrated that a motion to

dismiss the indictment on the statute of limitations would have been successful. Appellant's argument goes to the strategy of trial counsel, and fails under a Strickland analysis because the statute of limitations was tolled due to appellant's status as a fugitive. Appoloney, 761 F.2d at 525 (granting wide latitude to strategic decisions of counsel accused of ineffective assistance).

Title 18 U.S.C. § 3290 provides, "No statute of limitations shall extend to any person fleeing from justice." Under section 3290, the statute of limitations is tolled in instances in which "the accused concealed himself with the intent to avoid arrest or prosecution." United States v. Gonsalves, 675 F.2d 1050, 1052 (9th Cir.), cert. denied, 459 U.S. 837 (1982). The statute of limitations applicable to appellant's crime is five years. 18 U.S.C. § 1201. We affirm the holding of the district court that the statute of limitations was tolled under the circumstances of appellant's case. Aburahmah v. United States, 892 F. Supp. 1282, 1285 (D. Ariz. 1995). Under § 3290, the government need only prove

appellant's fugitive status by a preponderance of the evidence. Gonsalves, 675 F.2d at 1054. We conclude from the evidence presented that appellant's actions were consistent with those of a fugitive from justice.

The ultimate question of whether a defendant was "fleeing from justice" is one that is reviewed *de novo*. United States v. Fowlie, 24 F.3d 1070, 1072 (9th Cir. 1994), cert. denied, _ U.S. _, 115 S.Ct. 742 (1995). We find the record in the case consistent with a finding that appellant was fleeing from justice, such that the statute of limitations was properly tolled. As the Gonsalves case emphasized, "when an accused knowingly secretes himself, even diligent prosecutors may be thwarted from uncovering facts essential to the prosecution." Gonsalves, 675 F.2d at 1052. Under Title 18 U.S.C. § 3290, the statute of limitations will be tolled whenever a suspect flees with the intent of avoiding prosecution, even if prosecution has not actually begun at the time of flight. United States v. Ballesteros-Cordova, 586 F.2d 1321, 1323 (9th Cir. 1978). Appellant's intent may be inferred from

appellant's conduct. The record supports the conclusion that appellant took "significant affirmative steps to avoid prosecution." Fowlie, 24 F.3d at 1072; United States v. Wazney, 529 F.2d 1287, 1289 (9th Cir. 1976) ("It is enough that an accused leaves his usual place of abode and conceals himself for the purpose of avoiding arrest or prosecution").

Appellant next charges his trial counsel with ineffective assistance of counsel in submitting jury instructions that did not include a "live-victim" statement. Instructions to a jury are viewed in the context of the entire trial. Appoloney, 761 F.2d at 522. Defense counsel argued strenuously in closing argument to the jury that the government's burden was to prove beyond a reasonable doubt that Emerald was alive at the time that she was transported between Arizona and New Mexico. The conduct of trial counsel undermines appellant's assertion that counsel's performance was deficient, or that appellant suffered prejudice as a result of the allegedly inadequate jury instructions. Faced with arguments similar to those

presented here, the lower court held that trial counsel's performance was within the range of acceptable conduct under Strickland. Aburahmah, 892 F. Supp. at 1286. We agree.

Examining both the record in this case and the trial judge's familiarity with issues twice presented to him, we determine that there was inadequate evidence to raise a factual issue sufficient to justify an evidentiary hearing. Patel v. United States, 19 F.3d 1231, 1235 (7th Cir. 1994) ("[t]he district court need not hold a hearing in every case where the petitioner makes factual allegations"). Accordingly, we conclude that the district court did not abuse its discretion in denying appellant an evidentiary hearing prior to denying the subject § 2255 motion. Blaylock, 20 F.3d at 1464 (this court reviews the evidentiary rulings of the district court for abuse of discretion).

AFFIRMED.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

SAMI FAYEZ S. ABURAHMAH,	
Petitioner,	
vs .	JUDGMENT IN A CIVIL CASE
UNITED STATES OF AMERICA,	Case No. CR-92-705-T-JMR
Respondent.	(CIV-95-176-T-JMR)

JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

DECISION BY COURT. This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that petitioner's March 20, 1995 petition pursuant to 28 USC 2255 is denied.

IT IS FURTHER ORDERED that this case is DISMISSED.

July 7, 1995
Date

RICHARD H. WEARE
CLERK

Cont.

/s/ Renee Ludeke
(By) Renee Ludeke,
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

SAMI FAYEZ S. ABURAMAH, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	)	No. CV 95-176 TUC JMR CR 92-705 TUC JMR ORDER

Sami Fayaz S. Aburahmah (petitioner) petitions this Court to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. §2255. For the following reasons, the petition is denied.

BACKGROUND

In 1992, a federal grand Jury sitting in Arizona indicted petitioner for the kidnapping of his estranged wife, Emerald Crawford Aburahmah ("Emerald"). See 18 U.S.C. §1201. In 1982, petitioner was a foreign exchange student from the Middle East.[1] Petitioner and Emerald married in

January 1982, but experienced marital difficulties and separated after only a few months of marriage. Petitioner then moved to Paterson, New Jersey for several months but later returned to Tucson, Arizona.

On September 29, 1982, Emerald and a girlfriend, along with their dates, encountered petitioner at the Sundance Saloon in Tucson. There, an argument ensued and petitioner was escorted from the premises. Shortly thereafter, Emerald and her friends left the bar and drove off in their vehicle. Petitioner pursued Emerald's vehicle and a high speed chase ensued. Emerald told her girlfriend that petitioner was going to kill her.

Frightened to return to her home, Emerald resided at her girlfriend's home for two days. During these two days, petitioner and another male went to the home of Emerald's mother searching for Emerald. Emerald's luggage was seen inside petitioner's van.

On October 1, 1982, petitioner located Emerald at her girlfriend's home; witnesses observed petitioner

pulling Emerald by the arm into his van. Emerald was not seen alive by her family or friends after that date. Three days later, on October 4, 1982, a rock hunter discovered the smoldering body of an unidentified female in a remote area west of Deming, New Mexico. The woman's throat had been slit and her body severely burned. The body was later positively identified as Emerald.[2] Petitioner was in New Mexico during the first week of October 1982 having obtained a New Mexico drivers' license on October 6, 1982.

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[2] Apparently unaware of the strife between Emerald and petitioner, Emerald's mother believed Emerald had left the country with petitioner in 1982. Seven years later, in 1989, Emerald's mother learned that petitioner was in fact incarcerated in Alabama. Based on this discovery, Emerald's mother contacted the Tucson Police Department ("TPD") and reported her daughter as a missing person. The TPD launched an investigation which included circulating missing person flyers to various law enforcement agencies in the western United States. The flyer listed various features by which Emerald could be identified, including a peculiar toe formation on her left foot. In 1991, an investigator with the Medical Examiner's Office in Albuquerque, New Mexico saw the missing person flyer and recalled the 1982 discovery of a "Jane Doe" with an abnormal toe formation on her left foot. Dental records ultimately confirmed the identification.

At the time the federal indictment was filed, petitioner was serving a twenty-five year sentence in the Alabama Department of Corrections in connection with an unrelated 1984 conviction for murder and four counts of attempted murder. The federal indictment alleged that petitioner committed the charged offense on or about October 1, 1982. Following a jury trial, petitioner was convicted of Emerald's kidnapping. On August 4, 1993, petitioner was sentenced to life imprisonment; the life sentence to be served consecutive to the twenty-five year Alabama State sentence. On direct appeal, petitioner's conviction was affirmed.

As his sole claim for relief in this post-conviction relief proceeding, petitioner contends his trial counsel rendered ineffective assistance of counsel. Petitioner advances two contentions in support of this claim. First, petitioner argues that counsel rendered ineffective assistance by not moving to dismiss the indictment on statute of limitations grounds. Second, petitioner alleges

counsel rendered ineffective assistance because counsel did not request a "live- victim" Jury instruction.

DISCUSSION

A criminal defendant alleging ineffective assistance of counsel must show: (1) that an attorney's deficient performance was so serious that the attorney was not functioning as "counsel," and (2) that the deficient performance prejudiced the defendant thereby depriving him of a fair trial. Strickland v. Washington, 466 U.S. 668, 687 (1984); United States v. Davis, 36 F.2d 1424, 1433 {9th Cir. 1994), cert. denied, 115 S.Ct. 1147 (1995).

To establish deficient performance, the petitioner must show that his attorney "made errors so serious" that the attorney was not functioning as the counsel guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687. Prejudice exists where the defendant shows a "reasonable probability" that the result of the proceedings would have been different but for counsel's alleged errors. Id. at 694. In assessing counsel' B performance, the Court applies an

objective standard of reasonableness. Davis, 36 F.3d at 1433 (citation omitted)

The Court indulges "a strong presumption that . . . counsel's conduct falls within the wide range of reasonable professional assistance. Id.

The Court has a vivid recollection of counsel's performance. The Court has also reviewed the record in this matter. The Court finds that counsel' s performance surpassed the constitutionally required standard of objectively reasonable assistance. At the outset of litigation, counsel petitioned the Court for the appointment of an investigator, which the Court granted. Thereafter, counsel filed pretrial motions, submitted proposed voir dire questions and submitted proposed Jury instructions. At trial, counsel vigorously cross-examined witnesses, presented a defense witness, and made an opening statement and closing argument. After the verdict was rendered, counsel filed a cogent motion for a new trial. Counsel was tenacious in representing her client, and the

Court so noted at sentencing. The Court finds no deficient performance. Further, even assuming deficient performance, for the reasons set forth below, the Court finds no reasonable probability of a different result but for the alleged errors.

A. Statute of Limitations

Petitioner argues that counsel rendered ineffective assistance because counsel did not raise the statute of limitations as a basis for dismissing the indictment. This claim fails.

A five-year statute of limitations applies to non-capital federal offenses. 18 U.S.C.§ 3282. However, no statute of limitations applies "to any person fleeing from Justice."
18 U.S.C. § 3290. Emerald was murdered in October 1982; petitioner departed Arizona at this same time. Friends and relatives of Emerald believed that Emerald and petitioner had relocated elsewhere, possibly to the Middle East. Unbeknown to Emerald's friends and family, petitioner

traveled to Alabama. The grand jury indicted petitioner for Emerald' B kidnapping in 1992.

According to petitioner, counsel did not move for dismissal on statute of limitations grounds due "to counsel's failure to know the law, or to research the law." To the contrary, absent a showing otherwise, the Court presumes counsel acted competently within the broad range of reasonable professional assistance.[3] Davis, 36 F.3d

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[3] As an exhibit to his reply brief, petitioner attaches a letter written to petitioner's current habeas counsel, Eugene G. Iredale, from trial counsel, Harriette P. Levitt. The letter is dated March 22, 1995. Ms. Levitt begins the letter by stating that she is writing the letter at the request of Mr. Iredale in connection with the instant proceedings. Therein, Ms. Levitt states, "I was not aware that the federal statute of limitations was five years." Ms. Levitt then continues: However, I did give consideration to filing a motion to dismiss on the grounds of preindictment delay. I did not do so because I felt that any statute of limitations would be tolled during the period of time that no one knew that a crime had been committed. It simply did not make any logical sense to me that a statute of limitations could have expired before anyone knew that the victim had been kidnapped.

This letter does not alter the Court's conclusion. First, the letter is not a sworn affidavit. Even assuming it was, Ms. Levitt maintains, and the Court finds, counsel did not render ineffective assistance. Even if Ms. Levitt claimed to have rendered ineffective assistance, the Court would nonetheless not be persuaded. The letter indicates counsel was aware that ten years had elapsed between the crime and the 1992 indictment. Counsel was aware of

at 1433. Thus, petitioner has not overcome the first prong of the Strickland analysis i.e. demonstrating deficient performance. Even if petitioner had demonstrated deficient performance, the Court would nonetheless find no reasonable probability of a different result but for the alleged error. In claiming prejudice, petitioner asserts "[a] court would certainly have applied the law and dismissed the indictment outright . . . " Application of the relevant law leads the Court to conclude otherwise.

No statute of limitations applies "to any person fleeing from justice." 18 U.S.C. §3290. Therefore, if petitioner qualifies as a person who fled from Justice within the meaning of §3290, no statute of limitations applies, and no prejudice could inure to petitioner by virtue of counsel's failure to seek dismissal on statute of limitations grounds.

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the lapse of time and the possible grounds for a motion to dismiss based op the lapse of time but concluded that such a motion would not be successful. Thus, counsel's decision not to pursue this course was a tactical decision falling within the broad range of

Section 3290 tolls the statute of limitations where the accused concealed himself with the intent to avoid arrest or prosecution." United States v. Gonsalves, 675 F.2d 1050, 1052 (9th Cir. 1982) (citation omitted), cert. denied, 459 U.S. 837 (1982). The accused conceals himself to avoid arrest or prosecution where he "knew that he was wanted by the police and . . . failed to submit to arrest." Id. The government need only prove flight from justice under § 3290 by a preponderance of the evidence. Id. at 1054.

Here, contemporaneous with Emerald's disappearance, petitioner abruptly departed Arizona and traveled cross-country to Alabama. Emerald's body was discovered severely burned; her throat was also slit. [4] The body was left in a remote area of New Mexico. These facts reflect efforts to avoid detection and frustrate identification of the body. Evidence placed petitioner in New Mexico

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professional assistance.

[4] The government suggests that Emerald's throat was slit in an attempt to sever her head to further thwart identification of the remains.

during the first week of October 1982. Finally, evidence revealed that shortly after Emerald's death petitioner asked an acquaintance to tell anyone who inquired that petitioner was in Tucson at the time of Emerald's death; this fact suggests petitioner sought to establish an alibi. Not until 1989 did Emerald's mother learn that petitioner was imprisoned and, a fortiori, Emerald was not with petitioner.

On this record, the Court concludes the government has established petitioner's flight from Justice within the meaning of § 3290 by a preponderance of the evidence. Thus, §3290 tolled the statute of limitations until Emerald's body was positively identified in 1989.[5] The 1992 indictment was therefore filed within the five year

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[5] In this respect, trial counsel's analysis was absolutely correct. See supra note 3.

statute of limitations provided in 18 U.S.C. §3282.[6] Accordingly, even assuming deficient performance — the first prong of the Strickland analysis, petitioner can nonetheless not satisfy the second prong – demonstrating a reasonable probability of a different result but for the alleged error.

B. Absence of Live-Victim Jury Instruction

Petitioner next claims that counsel rendered ineffective assistance in failing to request a "live-victim"

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[6] The Court declines to accept the government's "continuing offense" argument. While kidnapping may qualify as a continuing offense under some circumstances, see United States v. Garcia, 854 F.2d 340 (9th Cir. 1988), cert. denied, 490 U.S. 1094 (1989), that doctrine does not apply here. In Garcia, two children, Olga and Nora, were kidnapped in 1975, transported from Mexico into California, and held there against their will. Nora was released in 1979, Olga was released in 1981. An indictment was returned in 1986. In rejecting a statute of limitations argument as to the kidnapping of Olga, the Ninth Circuit stated that "the crime of kidnapping continues as long as the victim is held." Id. at 343. Here, the government claims Emerald was held against her will, even though dead, at least until her body was positively identified. This argument cannot stand. The government presents no authority supporting its contention that a kidnapped person continues to be held, even after their death, until the identity of the person is established.

jury instruction. This instruction would presumably charge the Jury that in order for a defendant to be convicted of kidnapping under 18 U.S.C. § 1201, the government must prove that the abducted person was alive when transported across state lines.

In support, petitioner contends the Court noted this element just prior to closing arguments and defense counsel then argued the issue in closing argument.[7] Counsel did not request that the Court give an instruction containing the precise language he now suggests was necessary. According to petitioner, counsel's failure to request a live-victim instruction amounts to ineffective assistance of counsel. Petitioner maintains that no blood was found on Emerald's body nor in the soil beneath the body. This, according to petitioner, indicates Emerald was killed in Arizona, and only later disposed of in New Mexico.

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[7] At a sidebar conference prior to defense counsel's closing argument, the Court advised counsel, "If the victim was dead before she was taken across state lines, that is not a federal kidnapping crime." (R. at 76, 5/5/93).

Petitioner therefore contends the failure to request the instruction resulted in prejudice to petitioner in that a jury could find Emerald was killed in Arizona and only later transported to New Mexico.

The government suggests defense counsel did not request the instruction because a live-victim instruction would be inconsistent with the defense theory of the case — namely, petitioner's theory that a stranger abducted Emerald. Moreover, the government now contends that 18 U.S.C.

§ 1201 requires proof of no such element.[8]

The law requires that a kidnapping victim be alive at the time the victim wee transported across state lines. See, e.g., United States v. Davis, 19 F.3d 166, 169 (5th Cir. 1994); United States v. Rees, 193 F.Supp. 849, 858 (D.Md. 1961).

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8 The government never argued this position to the jury at trial.

This Court's instructions informed the jury that the government was required to prove Emerald was transported against her will. Counsel for both the government and petitioner argued inferences that could be drawn from the evidence as to whether Emerald was alive when transported across the Arizona\New Mexico state line.[9]

In relevant part, Instruction Ten charged the jury that the government must prove beyond a reasonable doubt:

> ONE: THE DEFENDANT KNOWINGLY AND WILLFULLY SEIZED, CONFINED, KIDNAPPED, ABDUCTED, OR CARRIED AWAY THE PERSON NAMED IN THE INDICTMENT;

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9 The Court's previous order discusses the sufficiency of the evidence as to whether Emerald was alive when she was transported in interstate commerce. Aburahmah, 827 F.Supp. at 615.

TWO: THE PERSON NAMED IN THE INDICTMENT WAS THEREAFTER TRANSPORTED IN INTERSTATE COMMERCE WHILE SO SEIZED, CONFINED, KIDNAPPED, OR ABDUCTED . . .

In relevant part, Instruction Eleven charged:

"KIDNAP" MEANS TO TARE AND CARRY AWAY A PERSON BY FORCE AND AGAINST HIS OR HER WILL. "SEIZE," "CONFINE," "ABDUCT," AND "CARRY AWAY " ALL MEAN THE PHYSICAL OR BODILY TARING AND CARRYING AWAY OF A PERSON, OR THE HOLDING OR RESTRICTION OF SOMEONE BY FORCE OR WITHOUT THAT PERSON'S CONSENT.

Thus, Instruction Ten and Instruction Eleven charge the Jury that a conviction for "kidnap requires a finding that the person was taken and carried away against

his or her will, n which in turn encompasses a finding that Emerald was alive when abducted. Instruction Eleven also charges that "seize, " "confine," "abduct," and "carry away" all involve "the physical or bodily taking and carrying away of a person, or the holding or restriction of someone by force or without that person's consent." This charge, like the "kidnap" charge just preceding it, requires non-consensual restraint of the victim. Subpart two of Instruction Ten charges that the abducted person must travel in interstate commerce "while so seized, confined, kidnapped, or abducted . . ." The instructions given properly instructed the jury as to the elements required under §1201.

Furthermore, defense counsel unequivocally argued to the jury that the government was required to prove beyond a reasonable doubt that Emerald was alive when transported from Arizona to New Mexico. During closing, defense counsel argued:

> Part of kidnapping, as the Judge has instructed you, is taking a person across state lines against their will. . . . [The prosecutor] didn't prove to you that Emerald was alive when she or her body went across the Arizona/New Mexico border.
>
> And if she hasn't proved that, you can't find that there was a kidnapping. Whether you like Sami or not, whether you think justice is being done or not, if you can't resolve beyond a reasonable doubt that she was still alive when she crossed into New Mexico, then you cannot find under federal law that there has been a kidnapping.

(R. at 112-13, 5/5/93).

For all the above reasons, the Court finds neither deficient performance nor a reasonable probability of a different result but for the alleged errors. Accordingly,

IT IS HEREBY ORDERED that petitioner's March 20, 1995 petition pursuant to 28 U.S.C. § 2255 is DENIED.

IT IS FURTHER ORDERED that this case is DISMISSED.

DATED this 6th day of July, 1995.

/s/ John M. Roll
JOHN M. ROLL
United States District Judge

827 F.Supp. 612
(Cite as: 827 F.Supp. 612)

UNITED STATES of America, Plaintiff,
v.
Sami Fayez ABURAHMAH, Defendant.

No. CR 92-705 TUC JMR.

United States District Court,
D. Arizona,
Tucson Division.

July 20, 1993.

Defendant was convicted of kidnap for murder, and he moved for new trial. The District Court, Roll, J., held that: (1) evidence supported conviction; (2) evidence of uncharged acts did not require new trial; and (3) juror's reading of newspaper article about case was harmless.

Motion denied.

[1] KIDNAPPING k5

232k5

Evidence established that victim was transported against her will while alive in interstate commerce; victim was forced into defendant's van and was found dead the next

day in adjacent state, it was unnecessary to cross border to dispose of victim's body in remote desert area, and victim stated intention of divorcing defendant and feared being killed by him. 18 U.S.C.A. § 1201(b).

[2] CRIMINAL LAW k369.2(4)

110k369.2(4)

New trial for kidnapping for murder was not warranted by admission of evidence of defendant's possession of firearms and knives and his practice of skinning rabbits; evidence of firearm was offered to show why victim accompanied defendant against her will, knife was used to slit victim's throat, practice of skinning rabbits showed dexterity with hunting knife, the evidence was not admitted merely to prove bad character, and district court gave cautionary instructions.

[3] CRIMINAL LAW k1174(2)

110k1174(2)

Juror's reading of newspaper article on case was harmless,

where jury had voted to convict, foreperson had signed verdict form, and bailiff was informed about verdict.

[4] CRIMINAL LAW k956(12)

110k956(12)

Defendant attempting to impeach verdict must show that jury had extrinsic evidence and that evidence could have affected verdict; burden then shifts to government to show that any such exposure was harmless beyond reasonable doubt.

[4] CRIMINAL LAW k956(13)

110k956(13)

Defendant attempting to impeach verdict must show that jury had extrinsic evidence and that evidence could have affected verdict; burden then shifts to government to show that any such exposure was harmless beyond reasonable doubt.

*612 Virginia Kelly, Asst. U.S. Atty., Tucson, AZ, for plaintiff.

Harriette P. Levitt, Tucson, AZ, for defendant.

ORDER

ROLL, District Judge.

Defendant was convicted by a jury of kidnap for murder of his wife, Emerald Crawford Aburahmah. Defendant Aburahmah has moved for a new trial pursuant to Rule 33, Fed.R.Crim.P., based upon four arguments:

1) The government failed to prove that the victim was alive when she was transported across state lines;

2) Even if the victim was alive when she was transported across state lines, the government failed to prove that she was transported against her will;

3) The district court erroneously admitted evidence of uncharged misconduct, including defendant's possession of knives and firearms and his skinning of rabbits; and,

4) Juror misconduct tainted the verdict.

The Court has considered both the memoranda of points and authorities submitted by the parties as well as the oral

arguments of counsel made at the hearing on the motion. *613 For the reasons set forth below, the motion for a new trial is denied.

FACTS

Viewing the evidence in the light most favorable to the government, United States v. Rush, 749 F.2d 1369, 1372 (9th Cir.1984), the facts are as follows. Defendant is from the Middle East. He was in the United States on a student program. On January 13, 1982, defendant and Emerald Crawford were married. The marriage was a stormy one and was strongly disapproved of by Emerald's family. During the summer of 1982, the defendant went to New Jersey for 2 1/2 months. Emerald began to see other men. When the defendant returned to Tucson from New Jersey in September, Emerald was dating an airman nicknamed "Okie," whose true name is Rick Young.

On one occasion, she needed medical treatment as a result of the defendant twisting her wrist. At another time, the

defendant wouldn't let Emerald out of his van. Emerald told a friend that she was afraid that the defendant would kill her. Emerald confided to another friend that the defendant told Emerald that if he couldn't have her, then no one could.

On Oct. 1, 1982, the defendant went to the Sundance Bar on 22nd Street in Tucson, Arizona, and encountered Emerald, who was with Okie, Sandra Sconza and Chris Sconza. Sandra Sconza joined the verbal altercation and told the defendant to leave Emerald alone. A bouncer removed the defendant from the bar. The Sconzas, Emerald, and Okie left the bar shortly thereafter. Sandy Sconza testified that the defendant began to follow the foursome and that a high speed chase ensued, during which the defendant crossed the divider and attempted to overtake them by proceeding in the face of oncoming traffic. [FN1] They escaped the defendant by going upon Davis Monathon Air Force Base (DMAFB), which was

limited access property.

FN1. This account was contradicted by Okie, who testified that he was driving that night and remembered no chase. Okie's account may have been disregarded by the jury as a result of evidence of Okie's intoxication on the evening of the alleged chase.

On October 2, 1982, the Sconzas, Emerald, and Okie went to Mt. Lemmon. Okie gave Emerald a souvenir half tee-shirt from Lake Tahoe. At the end of the day, Okie returned to DMAFB and the Sconzas and Emerald went to Sandy Sconza's house, where they spent the night. Emerald had no change of clothes.

On October 3, 1982, the Sconzas heard an automobile horn. Outside were the defendant and another individual, both of whom had apparently arrived in the defendant's van. Although the Sconzas urged Emerald not to meet

with the defendant, she insisted. Chris Sconza heard Emerald tell the defendant that she wanted a divorce. The Sconzas observed Emerald and the defendant argue, then saw the defendant pull Emerald by the arm into the van. [FN2] They did not report this to anyone. This was the last time any witness saw Emerald Crawford alive.

FN2. When this matter proceeded to trial, Chris and Sandy Sconza were divorced.

On October 4, 1982, a rock hunter came upon a smoldering body on a desert road near Deming, New Mexico. The woman's face and torso were badly burned, she was wearing a shirt and pantyhose, and she wore a wedding ring. Perhaps most importantly, her feet were intact. An autopsy performed on October 6, 1982, revealed that the woman died from having her throat slit by a very sharp instrument, such as a knife. The body was then set on fire. The fourth and fifth toes of her left foot

had a very unique formation. The muscle alcohol level of the woman was .06, which could have resulted from decomposition. Acid phosphatase was present in her vaginal vault, indicative of recent sexual intercourse. She was buried as a "Jane Doe."

The remote location off of Interstate 10 where the body was found had one set of tire tracks, and these tracks were made by a wide track vehicle, such as a van. In addition, one of the tires made an imprint consisting *614 of six parallel lines. In October of 1982, the defendant owned a van and at least one of the tires had six parallel lines on the tread.

New Mexico motor vehicle records reflected that on October 6, 1982, the defendant and a companion named Hisham Lulu attempted to obtain driver's licenses in New Mexico. Ahmed Aburahmah testified for the defense that he, the defendant, Lulu, and a fourth man, all traveled to

New Mexico to obtain driver's licenses. [FN3]

FN3. Ahmed Aburahmah, the only defense witness, testified that the New Mexico test was easier than that administered by Arizona officials.

During October, the defendant told Emerald's friend, Mary Alsoqui, that if anyone asked Alsoqui where the defendant had been in the last two days, she should say that the defendant had been in town. The defendant never asked Alsoqui to help find Emerald.

In November, 1982, the defendant met a young woman named Lynn. In December of 1982 he began to date her frequently. In the spring of 1983, the defendant spoke with Lynn by phone from Alabama and purported to go through a telephonic marriage ceremony. [FN4] Defendant never told this woman about his wife's disappearance or the fact that he was apparently still

married. She testified he always had a knife with him, either on his belt or in his van. She also testified that he was proficient at skinning rabbits with a knife.

FN4. At the time of this telephone call, the defendant was in jail in Alabama in connection with murder and attempted murder charges involving events unrelated to the present case. Evidence of the Alabama incarceration and the surrounding circumstances were not presented to the jury.

In 1989, Emerald's step-mother, Delfina Crawford, learned that Emerald was not with the defendant. She then went to the Tucson Police Department to report the possibility of foul play. The case was assigned to Detective Ruben Nunez. Det. Nunez contacted a number of Emerald's friends and relatives in an attempt to gain information about Emerald and to reconstruct the time frame surrounding her disappearance. On October 11, 1989, as

part of his investigation, Detective Nunez conducted a telephone interview of the defendant. The defendant denied knowing of Emerald's whereabouts. He stated that he had attempted to file a missing person report with the Tucson Police Department and that he and Mary Alsoqui had looked for the victim. The defendant stated that he last saw her in 1982. Detective Nunez could locate no missing person report filed by the defendant. Nunez then circulated bulletins describing the victim and the date of her disappearance. The bulletins disseminated to western law enforcement agencies included a description of the victim's peculiar toe formation.

In November 1991, a New Mexico official saw one of Detective Nunez's bulletins and recalled that the 1982 Jane Doe found near Deming had an abnormal toe formation. He contacted Detective Nunez and Emerald Crawford was identified as the 1982 Jane Doe.

On November 12, 1991, Nunez reinterviewed the defendant, this time in person. The defendant expressed shock at the victim's death. During a tape-recorded interview, the defendant denied involvement in Emerald's murder. He stated he had come home one day only to discover that all of her belongings were gone. He said that he tried to locate Emerald after she disappeared and never suspected her of infidelity. The defendant claimed that the marriage had been free of arguments or fights. He reiterated that he had reported the victim's disappearance to the police. He said that the phone wedding with Lynn had been arranged because she kept telling him how much she wanted to marry him. He stated that in his native land, when a wife was guilty of adultery, she was subject to being stoned to death. He said that adultery was proven by the testimony of four witnesses. The defendant pointed out that an adulterous wife's death sentence, however, was carried out by the government, not the husband.

In 1992, the defendant was indicted by a federal grand jury for kidnapping and for murder. A jury found the defendant guilty as charged.

*615 ANALYSIS

Standard for Deciding Rule 33 Motions

Rule 33 provides that the district court may grant a new trial to defendant "if required in the interest of justice." The decision to grant a new trial lies within the discretion of the district court. U.S. v. Rush, 749 F.2d 1369, 1371 (9th Cir.1984). However, a motion for a new trial "should be granted 'only in exceptional circumstances in which the evidence preponderates heavily against the verdict.' " United States v. Pimentel, 654F.2d 538, 545 (9th Cir.1981) (quoting 2 Wright, Federal Practice and Procedure, Criminal § 553 at 487 (1969)).

A motion for new trial based upon insufficient evidence must be denied if, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could

have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis supplied). If the evidence conflicts, then the conflict is to be "resolved in favor of the verdict." United States v. Ramos, 558 F.2d 545, 546 (9th Cir.1977).

Sufficiency of Evidence

A. Proof Victim Was Transported in Interstate Commerce While Alive

[1] Defense counsel argues that the government failed to prove that the victim was alive when she left Arizona and entered New Mexico. Defense counsel contends that if the victim was murdered in Arizona, the federal crime of kidnap for murder did not occur when her body was transported from Arizona to New Mexico.

The government relies upon the statutory presumption

that a kidnap victim not released within twenty-four hours was transported in interstate commerce. 18 U.S.C. § 1201(b). The government also argues that because of the vast desert area between Tucson and the Arizona/New Mexico border, if the defendant had intended to dispose of the victim's body in a remote desert area, it was clearly unnecessary to drive to Deming, New Mexico.

The government also relies upon United States v. Green, 680 F.2d 520, 524 (7th Cir.) cert. denied, 459 U.S. 1072, 103 S.Ct. 493, 74 L.Ed.2d 635 (1982). There, a seventeen year old female was last seen alive in Charlack, Missouri. Her body was found in a deserted area in East St. Louis, Illinois, across the river from Charlack. The Seventh Circuit affirmed the defendant's conviction of kidnap for murder, notwithstanding the defendant's assertion that insufficient evidence existed that the victim was alive when she was transported to East St. Louis. Even though the government's proof established that witnesses observed and

heard the victim being assaulted in Charlack the last time anyone saw her alive, the Seventh Circuit held that the district judge properly applied two common law presumptions: "(a) that death occurs where the body is found; and (b) that life continues until it is proven otherwise, for the purpose of determining federal jurisdiction." 680 F.2d at 524.

In light of the evidence presented and the applicable common law presumptions, sufficient evidence exists that the victim was transported in interstate commerce while alive.

B. Proof That Victim Was Transported Against Her Will

Defendant contends that the government failed to prove that the victim was transported in interstate commerce without her consent. Again, the evidence must be viewed in the light most favorable to sustaining the verdict. Rush,

749 F.2d at 1372.

Here, the evidence included proof that the victim was forced into the defendant's van, she was never seen alive again, she took none of her belongings with her, and she never told anyone that she planned on leaving Tucson. The victim had stated her intention of divorcing her husband and she feared that her husband was going to murder her. The defendant owned weapons available for use in abducting the victim and the victim's fatal injuries were consistent with one such weapon. The victim's body was found in an adjacent state the day after the defendant forced her into his van and physical evidence at the site where the body was found demonstrated that the defendant's van was used to take the *616 victim to that location. Motor vehicle records established that the defendant was in New Mexico the day after the body was found. The defendant gave inconsistent and false statements regarding his relationship with the victim and

his actions after she "disappeared." On these facts, the jury could reasonably have concluded that the defendant transported the victim against her will with the intent to murder her. Cf. State v. Hinkle, 26 Ariz.App. 561, 564-65, 550 P.2d 115, 118-119 (1976).

Uncharged Misconduct Evidence

[2] The defendant argues that a new trial should be granted because evidence of other acts of the defendant were admitted at trial. Specifically, the defendant argues that the trial court erroneously admitted evidence of the defendant's possession of firearms and knives and the fact that the defendant shot and skinned rabbits.

The government offered evidence of those firearms known by the victim to be possessed by the defendant in order to prove why the victim may have accompanied the defendant against her will. The government introduced evidence of the defendant's possession of knives because a knife was

used to slit the victim's throat and was the cause of the victim's death. Evidence of the fact that the defendant shot and skinned rabbits was offered by the government to show the defendant's dexterity with a hunting knife. None of these acts were admitted merely to prove bad character. Compare McKinney v. Rees, 993 F.2d 1378 (9th Cir.1993). This evidence showed that the defendant had the means to carry out the kidnapping and murder of the victim. Furthermore, the district court gave the jury cautionary instructions and, in its closing instructions, utilized defendant's jury instruction on uncharged acts. [FN5] The admission of this evidence does not require the granting of a new trial.

FN5. The instruction submitted by defense counsel was cited as Pattern Criminal Jury Instruction of the District Judges Association of the Sixth Circuit, No. 7.13 (1991). The instruction given to the jury stated:

1. You have heard testimony that the Defendant

committed some acts other than the ones charged in the indictment.

2. You cannot consider this testimony as evidence that the defendant committed a crime other than that for which he is on trial for now. Instead, you can only consider it in deciding whether he is guilty of kidnapping.

3. Remember that the defendant is on trial here only for kidnapping, not for the other acts. Do not return a guilty verdict unless the government proves the crime charged beyond areasonable doubt.

Juror Misconduct–Extrinsic Information

[3] The jury was repeatedly instructed to avoid reading, hearing, or watching any media reports regarding this case. This admonition was given in opening instructions and was repeated at various recesses during the trial.

After theverdict was announced in open court, the district judge, following a routine practice, went to the jury room

to thank the jurors for their service, answer any non-specific procedural questions they might have had, and solicit any suggestions for future jurors' comfort. The judge immediately noticed a copy of that day's Arizona Daily Star, a local newspaper, on the table. The judge promptly requested that all of the jurors remain in the jury room. Counsel and the defendant were still in the courtroom. The district court then conducted a hearing at which each juror was individually questioned as to whether they had read an article about the trial which had appeared in that morning's newspaper. Counsel were afforded the opportunity to examine each juror.

The hearing disclosed that the jury voted to convict the defendant, the foreperson signed the verdict form, and the bailiff was informed that the jury had reached a verdict. Only then, before the verdict was announced in court, did one juror begin to read the newspaper. That juror then informed the other jurors that the paper carried an article

on the trial. Although the juror proceeded to read the article, the juror did not tell the other jurors what the article said. The jury had no further discussions about the case after the verdict was signed. The jury then entered the courtroom, announced its verdict, *617 and was polled. No juror deviated from this account.

[4] A defendant must initially show that the jury had extrinsic evidence and that the evidence could have affected the verdict. The burden then shifts to the government to show that any such exposure was harmless beyond a reasonable doubt. United States v. Caro-Quintero, 769 F.Supp. 1564, 1574-75 (C.D.Cal.1991). Here, the district court took immediate steps to ascertain the precise breadth of the jury's exposure to extrinsic evidence. The article read by the juror contained a reference to the defendant's Alabama murder conviction. However, the article was not read by any of the jurors until after the verdict form had been signed and all that remained was for the jurors to

announce their verdict in open court.

Although it could be suggested that the possibility existed that one or more of the jurors would disavow the verdict during polling, the Ninth Circuit has pointed out that polling is conducted primarily "to discover possible coercion." United States v. McClintock, 748 F.2d 1278, 1293 (9th Cir.1984), cert. denied, 474 U.S. 822, 106 S.Ct. 75, 88 L.Ed.2d 61 (1985).

In United States v. Shepherd, 576 F.2d 719 (7th Cir.), cert. denied, 439 U.S. 852, 99 S.Ct. 158, 58 L.Ed.2d 155 (1978), verdicts were returned in open court involving four defendants, one of whom was acquitted. Before the jury was polled, the district Before the jury was polled, the district judge of the unpolled jury, administered a tongue-lashing which included the observation that "[m]any a jury would have found you guilty ..." 576 F.2d at 722. The judge then polled the jurors as to the verdicts

rendered against the co-defendants. One of the convicted co-defendants argued on appeal that the judge's comments prior to polling had tainted the verdicts. The Seventh Circuit pointed out that the judge's comments were not made until after deliberations had been completed. 576 F.2d at 724. The Seventh Circuit also stated that although it is possible that a juror could change his or her mind between the end of deliberations and the time of polling, "(e)xperience teaches ... that the likelihood of such a change of mind is remote." 576 F.2d at 724-25. The court explained:

The purpose of affording a right to have the jury polled is not to invite each juror to reconsider his decision, but to permit an inquiry as to whether the verdict is in truth unanimous.

576 F.2d at 725. Beyond a reasonable doubt, the juror's reading of the newspaper article in this case was harmless.

CONCLUSION

IT IS ORDERED that the defendant's motion for a new trial is DENIED.

END OF DOCUMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAR. 27 1:00 PM '97
RICHARD H. WEARE,
CLERK U.S. DIST.
COURT FOR THE
DISTRICT OF ARIZONA
By /s/ K.T.
DEPUTY CLERK

No. 95-16374
CT/AG#: CV-95-00176-JMR
CR-92-00705-JMR

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

SAMI FAYEZ S. ABURAHMAH

Defendant-Appellant

APPEAL FROM the United States District Court for the District of Arizona (Tucson).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District

Court for the District of Arizona (Tucson) and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered January 28, 1997.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
MAR. 25, 1997

By/s/ K.T.
Deputy Clerk

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sixth Amendment to the United States Constitution states as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; and to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 18, U.S.C. § 1201(a):

> (a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a

minor by the parent thereof, when: (1) the person is willfully transported in interstate of foreign commerce . . . (2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States; any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 46501 of title 49; (4) the person is a foreign official , an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this Title; or (5) the person is among those officers and employees designated in section 1114 of this Title and any such act against the person is done while person is engaged in, or on account of, the performance of official duties; shall be punished by imprisonment by any term of years or for life and if the death of any person

results, shall be punished by death or life imprisonment.

The statute of limitations on offenses committed under 18 U.S.C. § 1201 is set out in 18 U.S.C. § 3282:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next such offense shall have been committed after such offense shall have been committed.

18 U.S.C. §3290 :

No statute of limitations shall extend to any person fleeing from justice.

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds

that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a

prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

6. On October 1, 1982, the defendant found the victim at her friend's house and was seen forcing her into his van. The victim was not seen by her friends or family since that date.

7. On October 4, 1982, the body of an unidentified female (later determined to be the victim) was found by a rock hunter in the Victoria Mountains in Luna County, just outside of Deming, New Mexico. The throat of the woman had been slit, and the body had been badly burned. An autopsy revealed the victim had bled to death from a severed carotid artery.

8. It was determined the defendant was in New Mexico at or about that time, as on October 6, 1982, he and another individual obtained (New) Mexico driver's licenses in Albuquerque, New Mexico.

9. The defendant was arrested in Troy, Alabama, on May

18, 1983, for murder and four counts of attempted murder. He was subsequently convicted of those charges and has remained in custody until his indictment and arrest on the instant charges.

Victim Impact:

10. The victim's mother was contacted reported she felt the defendant should pay for his crime. She believes he is responsible not only for her kidnapping, but her murder as well. The victim's mother had the victim's body brought to Tucson and buried. She paid a total of $7,000 and noted that her brother took out a loan for these costs. However, she indicated she does not want anything from the defendant, and if he is ordered to pay restitution, she will probably donate the money to charity.

Acceptance of Responsibility:

11. The defendant denied any involvement in this offense. His recollection of the dates, and the actual occurrence of some of the incidents (i.e., contact with the victim at the bar on 22nd Street) differs from the Government's version. He denied taking Emerald in his van or harming her in any way.

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Q: Are you familiar with a case of the United States v. Sami Aburahmah?

A: Yes, ma'am, I am.

Q: All right. During the course of your investigation of this case, did you talk to Mr. Aburahmah?

A: Yes, I did.

Q: Could you tell us when your first conversation was, please?

A: My first conversation with Mr. Aburahmah, who is seated at the table with the blue shirt and the beard and glasses, was a phone conversation I had with him on October 11th, 1989.

Q: Where were you when that call was placed?

A: I was at the main police station, 270 South Stone.

Q: And where was Mr. Aburahmah?

A: I believe he was – he was in custody in Birmingham.

Cont. page 5

Q: Birmingham, Alabama?

A: Yes, ma'am.

Q: All right. And could you tell us how you came to talk to him on the telephone, as far as the mechanics of placing the call.

A: What happened is earlier that morning I called the Birmingham Prison and asked if I could speak with Inmate Aburahmah. He said he would take a message. I left my number and name. And then a few hours later he called. He

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called collect, and I spoke with him on the phone.

Q: All right. At that time what kind of – what were you investigating or trying to learn through Mr. Aburahmah?

A: Well, I had received a case report listing the victim in this case, Emerald Pesquiera Aburahmah, as a missing person on October 5th of 1989. So this is six days later, and I'm talking to him. He was the husband, "he" being Mr.

Aburahmah, and I was just asking him if he knew where she was, you know, being that he was her husband.

Q: All right. And did you have a conversation with him then?

A: Yes, I did.

Q: All right. Were any Miranda warnings or anything read to him at the time you talked to him?

A: No, ma'am, but I did record the conversation, and then a transcript of that phone conversation was typed up.

Q: All right. At the time that you talked to hi, was he a suspect in this case?

A: Yes, he was.

A: All right. Sir, then did you – during the course of that conversation, did you ever confront him with that, that he was a suspect?

A: No, he was not confronted with that information.

Q: Did you make any promises to him, or anything like

that, when you talked to him?

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A: No, ma'am.

Q: All right. And at that time, did you know what had happened to his wife?

A: No.

Q: So was it strictly a missing person report then?

A: It was a missing person report, and the information I had a t that particular time was that he, Mr. Aburahmah, was in custody, and that he was her husband. So whether you want to describe that as a suspect or not, I don't know, but he was listed as a contact person on the report.

Q: Okay. Then, sir, did you ever talk to him again after that time in October of 1989?

A: Yes, ma'am, I did.

Q: And when was that?

A: It was during the Thanksgiving – I believe it was November 30th of '91.

Q: All right.

A: Or "90.

Q: '91, '90; would it help you to refer to your report on that?

A: Yes.

MS. KELLY: Your Honor, may I approach the witness?

THE WITNESS: Yes. '91; November 30th, 1991.

BY MS. KELLY:

Q: Okay. Could you tell us what happened on November 30th,

1991, as far as talking to Mr. Aburahmah; where it was, how you got there and so on.

A: Yes, ma'am. FBI Special Agent Gary Price and I flew to Alabama, and we met with the warden there, spoke with him briefly. He took us to his office, the warden did, and about 30 minutes later Mr. Aburahmah showed up. He sat down. We introduced ourselves. Agent Price and I .

introduced ourselves.

I had a tape running at the time, tape recorder. I advised him of his Miranda rights, and I read them from my rights card, which I carry with me in my wallet. And then Agent Price had him sign some form that he had.

Q: All right. Now the report I just handed you, that is the transcript from that interview; is that correct?

A: Yes, ma'am, it is.

Q: And does that - that includes the language that you used when you advised him of his Miranda rights?

A: Yes, ma'am.

Q: Okay. Could you, using that report then, or that transcript, tell the Court what it was that you told him?

A: Yes, ma'am, I can.

Q: I think it's just on the front page, Agent.

A: Okay. Reading this, what happened is Agent Price has him read his rights.

Q: All right.

Went, she had to go. She did not like his friends. That's mostly it. She could not get out.

Q: Now, you observed them out together a lot, didn't you?

A: Yes.

Q: And is it fair to say that Sami spent a lot of money on Emerald?

A: He took her out to dinner almost every night, I would say. He would buy her things, things that she liked, clothes, any type of things like that. He would take her shopping. Yeah, he did.

Q: After Emerald disappeared, did you ever see Sami again?

A: Yes, I did.

Q: Do you remember how many times you saw him?

A: Approximately four times that I can remember.

Cont. page 214

Q: Now, the first time that you saw him, do you remember about where that was in relation to when you last saw Emerald?

A: It was in October. I know it was before Halloween and after she left my apartment.

Q: And what happened when you saw him on that first occasion, what did he say?

A: On the first occasion, it was a car sale.

Q: Tell us about that.

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A: I am sorry. It was either the car sale or a statement that was made.

Q: Which one?

A: I will say one first and then the other.

Q: Were they at the same time or –

A: It was in the same period, but different occasions

Q: How far apart were those occasions?

A: Well, I know it was before Halloween. I know it was in October.

Q: But between one another, between the statement you are referring to and the car incident, were they close in time?

A: Approximately maybe a week or a week and a half apart from each other, somewhere around there.

Q: Do you remember if the statement or the car came first?

A: It might have been the statement first.

Q: What was the statement that was made?

A: Should I just tell you the scenario or just answer?

Q: Just explain the circumstances under which he came to your house and what was said.

A: I was in my apartment, sitting down, watching TV. My husband was with me. When he came over, he stated that if anyone asked where he was in the last two days, just say

Cont. page 215

that he was around, that he was there. And I made no comment. I made no

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answer and neither did my husband.

Q: And then the car incident, would you describe that, please?

A: That came later on when he asked me to sell Emerald's car. I needed permission to sell her car. So I was given a yellow legal sheet letter, bottom half written that I would go ahead and sell the car and was given permission.

Q: Who gave the permission on that form?

A: Emerald.

Q: Was it her signature?

A: I can't remember the writing. I really can't say.

Q: That is two times. And then you say you saw Sami again a couple more times. Can you describe those?

A: The third time was my son's birthday. That was

December the 11th.

Q: And then the last time?

A: The last time was a week before we left town, my husband asked for a favor to use his van. And he helped him move our heavy things, our bulky things in that van.

Q: After Emerald disappeared, did Sami ever ask you to go with him to look for her?

A: There was only one occasion where he did.

Q: Was that after she disappeared?

A: No.

A: Not really.

Q: After you moved here, did you get – what was your first job?

A: I worked in Sodas for a while on Grant Road, and then I worked at Cappy's.

Q: And while you were working at Sodas, was someone named Debbie Estrada working there, also?

A: Yes, there was.

Q: And Debbie introduce you to anybody?

A: Sami.

Q: And that would be when you saw Sami. Would you point out who you are talking about?

A: The gentleman right behind you.

Q: When was it approximately that you were introduced to him?

A: In, I would say, November of '82.

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Q: Early or late November?

A: I can't exactly remember.

Q: Can you remember where you met him?

A: I believe it was at Somerset.

Q: That is what kind of a place?

A: A nightclub on Speedway.

Q: And what did you do there?

A: Me and my girlfriends use to just go out and we ran into him there one night.

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Q: Had you been introduced to him before that by Debbie?

A: Yes, at Sodas.

Q: So he had come into Sodas?

A: Yes.

Q: To see Debbie or to shop?

A: Yes, to see Debbie.

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Q: And after you met him then, did you have occasion to see him again?

A: Not straight off, but then I would see him on occasion.

Q: Where did you see him?

A: I didn't see him for a couple of months, and then I saw him in another bar, and then he had been over at my house.

Q: Can you remember back like, for instance, around Thanksgiving of that year, 1982, were you seeing very much of him around then?

A: I don't believe that he was around at that time.

Q: When you met him, did you ever start dating him pretty steadily?

A: Yes.

Q: When was that?

A: The first of the year, somewhere in '83, beginning of '83.

Q; Did he tell you anything about himself at that time, like where he was from?

A: He told me where he was from, but that was about it.

Q: The country he was from?

A: Uh-huh.

Q: Did he tell you why he was in the United States?

A: He was going to school.

Q: And was he in fact – did you see him going to school?

A: No, not actually. He would tell me he was going to school.

Q: All right. Did he have textbooks?

A: Yes, he did.

MS. LEVITT: I object on relevance grounds.

THE COURT: Overruled.

BY MS. KELLY:

Q: Did he ever talk to you about his ex-wife or his former wife, Emerald Crawford?

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A: No, he did not.

Q: When was the first time that you ever heard about Emerald even existing?

A: Two years ago when Detective Nunez came to me.

Q: All right. During the time that you knew him and he was going to school, what it was that he was studying?

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A: I believe it was engineering.

Q: Did you ever go over to anyplace where he lived?

A: No, I did not.

Q: Was there a time that he shaved his head during this period?

A: Yes.

Q: Was that soon after you met him?

A: Say around April.

MS LEVITT: Objection to relevance, Your **Cont.**

Honor.

THE COURT: Ms. Kelly?

MS. KELLY: Would you like me to approach and respond?

THE COURT: Yes, please. Would counsel approach the bench.

(Thereupon, counsel approached the bench and conferred with the Court as follows:)

MS. KELLY: The immigration officer is going to explain that he was here on student status and really was not here legally. And the fact that he shaved his head, did not take her where he lived, indicates that he had some concerns about his immigration status. And since this is supposedly a marriage for immigration reasons, I think that is relevant..

MS LEVITT: This is highly speculative. She is not going to be able to establish that he shaved his head

because he was worried about his immigration status.

Additonally, I think we are getting into an area of testimony where she is likely to open the door to somehting that might cause a mistrial. I am concerned about her going into this whole area other than to say that he left town in May or in April, whenever he left town, but that –

THE COURT: Are you talking about the Alabama matters?

MS. LEVITT: She has been told not to talk about that.

MS. KELLY: I can remind her again.

MS LEVITT: The major thing is that they went to Immigration in September of '82, so she is going to say in May of '83 had nothing to do with it. And I don't want the jury to think that he is a skinhead or lunatic or something.

THE COURT: I will sustain the objection.

(Thereupon, counsel returned to their trial tables; after which the proceedings resumed in opne court as follows:)

BY MS. KELLY:

Q: Ms. Lyman, did Mr. Aburahmah ever talk to you

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about his legal status in the United States?

A: No, he did not..